

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOYCE A. RHODEHAMEL,

Plaintiff,

v.

ROBERT H. RHODEHAMEL, individually
and as trustee of the Emma C. Rhodehamel
Trust, DEAN SARGENT, DANIEL F.
QUICK, McKISSON, SARGENT &
OLIASON, P.S., CAROLE CARROLL, PAT
CARROLL, RHR FOUNDATION, and CRC
PAPILLON FOUNDATION,

Defendants.

No. C07-0081Z

ORDER

THIS MATTER comes before the Court on a motion to dismiss brought by defendants Carole Carroll, Patrick Carroll, and CRC Papillon Foundation (collectively, the “Carroll Defendants”), a motion for summary judgment brought by defendants Dean Sargent, Daniel Quick, and McKisson, Sargent & Oliason, P.S. (collectively, the “Law Firm Defendants”), a motion for summary judgment brought by defendants Robert Rhodehamel and RHR Foundation (collectively, the “Rhodehamel Defendants”), and a motion for sanctions brought by the Rhodehamel Defendants and joined by the Carroll Defendants. Having considered all papers filed in support of and in opposition to each motion, the Court does hereby ORDER:

- (1) The Rhodehamel Defendants' and the Law Firm Defendants' respective motions to strike, docket nos. 56 and 57, are DENIED;
- (2) The Carroll Defendants' motion for dismissal, docket no. 36, is GRANTED;
- (3) The Law Firm Defendants' motion for summary judgment, docket no. 38, is GRANTED IN PART and DEFERRED IN PART;
- (4) The Rhodehamel Defendants' motion for summary judgment, docket no. 40, is GRANTED IN PART and DEFERRED IN PART;
- (5) Counts II and V are DISMISSED with prejudice; Counts III and VII are DISMISSED without prejudice; Carole Carroll, Patrick Carroll, and CRC Papillon Foundation are DISMISSED as defendants;
- (6) The remaining parties shall file SUPPLEMENTAL BRIEFS as described later herein;
- (7) The Law Firm Defendants' and the Rhodehamel Defendants' motions for summary judgment, docket nos. 38 and 40, are RENOTED IN PART to March 14, 2008;
- (8) Plaintiff's motion to correct response, docket no. 54, is GRANTED;
- (9) The Rhodehamel Defendants' and Carroll Defendants' joint motion for sanctions, docket nos. 59 and 61, is DEFERRED and RENOTED to March 14, 2008; and
- (10) The Clerk is directed to send a copy of this Order to all counsel of record.

Background

In this action, plaintiff Joyce Rhodehamel asserts *inter alia* breach of fiduciary duty, fraud, and conspiracy claims against principally her brother, her sister, and her deceased mother's attorneys in connection with the testamentary scheme implemented during the few years directly preceding her mother's death. Emma Rhodehamel died in October 2004, leaving behind three adult children, Robert, Carole, and Joyce, and substantial assets. Exhs.

1 41, 48, & 58 to Anderson Decl. (docket no. 46). Approximately eleven years before her
2 death, while still living in Indiana, Emma had executed a Will, bequeathing her estate
3 equally to Robert, Carole, and Joyce. Exh. 17 to Anderson Decl. About three years later, in
4 October 1996, Emma created a revocable trust (the “Trust”), naming herself as sole trustee
5 and funding it with 93,440 shares of Eli Lilly & Company common stock, which had an
6 approximate value of \$3.1 million. Exhs. 3 & 4 to Bertram Decl. (docket no. 41); see
7 <https://investor.lilly.com/chart.cfm> (price at closing on Oct. 7, 1996, was \$33.00); see also
8 Fed. R. Evid. 201(c)(“A court may take judicial notice, whether requested or not.”). The
9 trust instrument provided for Robert, Carole, and Joyce to receive equal portions of the
10 remaining res upon Emma’s death. Art. III, Exh. 3 to Bertram Decl. The stock split in 1997,
11 resulting in a trust res of 186,880 shares. See <https://investor.lilly.com/dividend.cfm> (2-for-1
12 split was declared on Sep. 15, 1997, and payable on Oct. 15, 1997).

13 In April 1999, at the age of 81, Emma moved from Indiana to Seattle, and began
14 living with Robert. Complaint at ¶ 13 (docket no. 1). A little over a year later, Emma started
15 executing documents that would drastically alter her testamentary scheme, effectively
16 disinherit Joyce, and give rise to this lawsuit. On June 20, 2000, Emma signed an
17 amendment to the trust instrument, appointing Robert as co-trustee and changing the
18 applicable law to Washington instead of Indiana. Exh. 5 to Bertram Decl. On the same day,
19 Emma executed a durable power of attorney, granting Robert “all powers of an absolute
20 owner over [her] assets and liabilities,” including the ability to “transfer any property [she]
21 own[ed] into any trust, whether or not created by [her], and regardless of who is benefitted
22 by the trust.” Exh. 24 to Anderson Decl.

23 A couple of weeks later, on July 11, 2000, Emma and Robert both executed a First
24 Restatement of the Trust, which provided for each beneficiary to disclaim rights in the trust
25 property in favor of distribution upon Emma’s death to a charitable remainder unitrust. Exh.
26 7 to Bertram Decl. On the same day, Emma signed a new Will under which her estate was

1 devised to the Trust. Exh. 48 to Anderson Decl. About a month later, the ECR First Living
2 Charitable Remainder Unitrust (the “First CRUT”) was established; Dean Sargent was
3 named as trustee. Exh. 27 to Anderson Decl. Both Emma’s and Mr. Sargent’s signatures
4 appear on the First CRUT instrument. Id. The First CRUT was funded with \$25,000 and
5 10,000 shares of Eli Lilly & Company stock, transferred from the Trust. Id. At the time, the
6 stock had a value of \$762,500. Exh. 41 to Anderson Decl.; [https://investor.lilly.com/](https://investor.lilly.com/chart.cfm)
7 [chart.cfm](https://investor.lilly.com/chart.cfm) (price at closing on Aug. 10, 2000, was \$76.25). Pursuant to the First CRUT
8 instrument, upon Emma’s death, the remaining res would be distributed to the RHR
9 Foundation, an organization controlled by Robert. Exh. 27 to Anderson Decl.

10 On the same date that the First CRUT was created, Rhodehamel Investments, LLC
11 (the “LLC”) was also established. Exh. 15 to Bertram Decl. The Limited Liability Company
12 Agreement (the “LLC Agreement”) bears only Emma’s signature. Id. Emma was named
13 General Manager of the LLC and retained a 70% interest; Robert, Carole, and Joyce were
14 each assigned a 10% interest. Exh. 28 to Anderson Decl. The LLC was funded with
15 \$100,000 and 38,700 shares of Eli Lilly & Company stock, transferred from the Trust. Id.
16 At the time, the stock had a value of \$2,950,875. Exh. 41 to Anderson Decl.; see also
17 <https://investor.lilly.com/chart.cfm> (price at closing on Aug. 10, 2000, was \$76.25).
18 Pursuant to the LLC Agreement, a member’s interest in the LLC was not transferable except
19 to another member of the LLC or a lineal descendant or ascendant of Emma Rhodehamel.
20 LLC Agreement at § 3.7, Exh. 15 to Bertram Decl. A member could not withdraw capital
21 contributions, and distributions could be made only at the sole discretion of the General
22 Manager. Id. at §§ 3.5 & 7.7. The LLC was scheduled to dissolve on January 1, 2050,
23 absent written agreement of all members to dissolve on an earlier date. Id. at §§ 1.4 & 8.1.
24 At the time the LLC Agreement was executed, Joyce Rhodehamel was almost 54 years old,
25 was unmarried, and had no children. See Affidavit at ¶ 2, Exh. 1 to Anderson Decl. From
26 Joyce’s perspective, the LLC would benefit only Carole, who had children, and Robert, who

1 as successor General Manager would receive a salary and would have exclusive control over
2 the LLC. See Affidavit at ¶ 11, Exh. 1 to Anderson Decl.; see also LLC Agreement at § 5.1,
3 Exh. 15 to Bertram Decl.

4 In October 2000, Joyce's attorney, James W. Smyth of Crotty & Smyth, a firm with
5 offices in Indiana and Illinois, wrote to Daniel Quick, Emma's attorney, and indicated that
6 Joyce "has intentionally disclaimed the gift of LLC interest as currently structured." Exh. 34
7 to Anderson Decl. Mr. Smyth explained the tax-based reasons for Joyce's decision and then
8 made inquiries concerning Emma's testamentary intentions so that Joyce could "request
9 changes consistent with Emma's desires for the LLC." Id. In the letter, Mr. Smyth asked
10 whether Emma desired for Robert to become General Manager upon her death, noted that
11 removal of the General Manager required a vote of members holding an 80% interest in the
12 LLC, and queried whether he correctly understood that, upon Emma's death, Robert would
13 control more than 20% of the LLC. Id. The implication of the latter fact, if true, was that
14 Robert could not be replaced, without his consent, as General Manager of the LLC.

15 In response, Mr. Quick sent a letter to Mr. Smyth stating that "Rhodehamel
16 Investments, LLC has accepted Joyce Rhodehamel's disclaimer of the gift of an interest in
17 the LLC." Exh. 35 to Anderson Decl. Mr. Quick further indicated that "since Joyce has
18 declined to participate in the LLC, Emma feels that Joyce is not entitled to receive any
19 further information concerning the LLC or its future management. Emma is satisfied with
20 the LLC agreement as it is, and does not believe any changes are necessary." Id.

21 Approximately one month later, on November 20, 2000, Emma and Robert both
22 executed a Second Restatement of the Trust. Exh. 8 to Bertram Decl. The Second
23 Restatement removed Joyce as a remainder beneficiary. Id. On the same day, the ECR
24 Second Living Charitable Remainder Unitrust (the "Second CRUT") was created, naming
25 Dean Sargent as trustee and the CRC Papillon Foundation as remainder beneficiary. Exh. 22
26 to Bertram Decl. Both Emma's and Mr. Sargent's signatures appear on the last page of the

1 Second CRUT instrument. *Id.* The Second CRUT was funded with \$25,000 and 10,000
2 shares of Eli Lilly & Company stock, transferred from the Trust. *Id.* At the time, the stock
3 had a value of \$877,500. Exh. 41 to Anderson Decl. (estimating the stock to be worth
4 approximately \$800,000); <https://investor.lilly.com/chart.cfm> (price at closing on Nov. 20,
5 2000, was \$87.75).

6 In March 2001, Emma signed an amendment to the Trust, reinstating Joyce as a
7 remainder beneficiary, but including a “no contest” provision. Exh. 9 to Bertram Decl. The
8 “no contest” clause stated:

9 After the death of the Trustor, if any person, whether a beneficiary under this
10 Agreement or not mentioned herein shall contest this Agreement or any other
11 estate planning document executed by the Trustor, or object to any provisions
12 contained in this Agreement or other estate planning document, I direct the
13 Trustee to give to such person so contesting or objecting the sum of One Dollar
14 (\$1.00) and no more in lieu of the provisions, if any, which I have made or
15 which I might have made in this Agreement . . . for such person so contesting
16 or objecting. For purposes of this section, other estate planning documents
17 shall include, without limitation . . . any other estate planning document
18 executed by me prior to or subsequent to this Agreement.

19 *Id.* at § 2. Contemporaneously with this final amendment to the Trust, Emma executed a
20 new Will, which disinherited Joyce. Exh. 45 to Anderson Decl. The Will contained a
21 similar “no contest” provision. *Id.* at Art. IV, § 1. In addition, Emma signed a letter drafted
22 by Daniel Quick and addressed to Joyce via her attorney. Exh. 47 to Anderson Decl. The
23 letter advised Joyce that, as a result of the recent amendments, Joyce would be an equal
24 beneficiary of the remaining Trust property, but would not inherit any interest in the LLC or
25 via Emma’s Will. *Id.* The letter indicated Emma’s desire that her “estate be settled without
26 any contest or litigation,” but did not specifically mention the “no contest” provisions
incorporated into the Trust and the Will. *Id.*

About two months after the Trust and the Will were revised, in May 2001, Robert was
appointed General Manager of the LLC. Exh. 51 to Anderson Decl. Approximately one
year later, on May 16, 2002, Robert, as attorney-in-fact for Emma, executed a document
creating the ECR Charitable Lead Annuity Trust (the “CLAT”). Exh. 23 to Bertram Decl.

1 Dean Sargent was named as trustee. *Id.* Emma's signature was not affixed to the CLAT
2 instrument. *Id.*

3 The CLAT was funded with \$50,000 and 15,000 shares of Eli Lilly & Company
4 stock. At the time the stock had a value of \$951,150. *See* Exh. 41 to Anderson Decl.
5 (estimating the stock was worth \$960,000); <https://investor.lilly.com/chart.cfm> (price at
6 closing on May 16, 2002, was \$63.41). During Emma's life, the CLAT was to pay the RHR
7 Foundation and the CRC Papillon Foundation each 50% of the annuity trust payments,
8 which were for each year 10% of the initial net fair market value of the trust assets, or about
9 \$50,000 per year per foundation; upon Emma's death, the remainder of the CLAT's res was
10 to pass to Robert, Carole, and Joyce in equal shares. Exh. 23 to Bertram Decl. Had Emma,
11 however, lived for another ten years after formation of the CLAT, Joyce would have received
12 nothing because the trust property would have been fully exhausted by distributions to
13 Robert's and Carole's charities. *See id.* The CLAT was an irrevocable trust, established
14 without Emma's personal signature, and it did not itself contain a "no contest" provision.
15 *See id.* The transfer of assets from the Trust to the CLAT was performed by the Charles
16 Schwab Corporation upon solely Robert's signature. *See* Exh. 56 to Anderson Decl.

17 When Emma died in Seattle on October 20, 2004, Robert and Carole were both living
18 in Seattle, but Joyce resided in Indiana. Exh. 58 to Anderson Decl.; Exh. A to Strabuk Decl.
19 (docket no. 37). On that date, Eli Lilly & Company stock closed at \$55.10 per share. *See*
20 <https://investor.lilly.com/chart.cfm>. The Trust res apparently included 113,180 shares of Eli
21 Lilly & Company stock, *i.e.*, the original amount after the 1997 stock split minus the
22 amounts transferred to the LLC, the CRUTs, and the CLAT; the stock was worth
23 approximately \$6.2 million. *Compare* Exh. 64 to Anderson Decl. (reporting that the Trust
24 assets had a fair net value of just over \$6.85 million at the time of Emma's death). On
25 January 14, 2005, both Robert and Carole executed Schedule B to the Trust, which waived
26 any right to a judicial proceeding concerning the estate pursuant to RCW 11.96A.080 (the

1 Trust and Estate Dispute Resolution Act, or “TEDRA”), as well as any right to contest
2 Emma’s legal capacity or to claim undue influence or fraud with respect to the execution of
3 the Will, the various trust agreements, or the LLC Agreement. Exh. 10 to Bertram Decl. By
4 letter dated February 18, 2005, from Daniel Quick to John Nelson of Smyth, Hester &
5 Associates, Joyce was given a deadline of March 15, 2005, to sign Schedule B or be deemed
6 not to have consented to the agreement and thereby precluded from receiving distributions
7 from the Trust or the CLAT. Exh. 60 to Anderson Decl.

8 Joyce declined to sign Schedule B, instead filing in King County Superior Court a
9 Petition for Judicial Determination. Exh. 6 to Anderson Decl. The petition was captioned
10 “In re Estate of Emma L. Rhodehamel,” described Robert, Carole, and Emma, but not
11 Emma’s attorneys, as parties, and sought a declaration of Joyce’s rights with respect to
12 Emma’s estate. *Id.* The petition requested that Joyce be appointed personal representative
13 for the estate, that Robert provide an accounting, that Emma be declared incompetent or
14 subjected to undue influence during the five years preceding her death, and that Robert and
15 Carol be required to disgorge assets received from the estate. *Id.* at §§ 3.3, 3.4, 3.6, 3.8-3.11.

16 As personal representative for the estate, Robert moved for summary judgment,
17 setting a hearing date of February 15, 2006. Exh. 2 to Anderson Decl. Joyce’s attorney,
18 then only recently retained,¹ filed a motion for a thirty-day continuance of the hearing,
19 indicating that he anticipated filing a motion for leave to amend the petition and a cross-
20 motion for summary judgment and that he needed additional time to review the over 30,000
21 pages of discovery and prepare a response. Exh. 9 to Anderson Decl. King County Superior
22 Court Judge Mary Roberts denied the motion for continuance without substantive
23 explanation. Exh. 11 to Anderson Decl. Judge Roberts also denied a related motion to
24

25 ¹ When the Petition for Judicial Determination was first filed and later amended, James B. Parsons of the
26 Parsons Law Firm, which was located in Bellevue, represented Joyce. *See* Exh. 6 to Anderson Decl. At the
time the motion for continuance was filed, David A. Anderson of Anderson & Associates, P.C., a firm in
Indiana, had recently been retained as lead counsel. *See* Exh. 9 to Anderson Decl.

1 shorten time on a cross-motion, stating that petitioner had failed “to state any reason for
2 having not filed the [cross-]motion for summary judgment in a timely manner.” Exh. 12 to
3 Anderson Decl. (emphasis in original).

4 Judge Roberts presided over a hearing on February 16, 2006. Exh. 4 to Anderson
5 Decl. During the hearing, counsel for Robert Rhodehamel stated:

6 There are claims that [Robert] has breached his fiduciary duty and was
7 engaged in self-dealing. I want to bring to your attention, Your Honor, that
8 none of those allegations are before this Court. They have never been pled in
9 the petitioner’s pleadings. This is a will contest brought against the estate.
Robert Rhodehamel, the personal representative, is not individually sued in this
matter. For them to bring a claim of breach of fiduciary duty and self-dealing
against him personally at this juncture is simply inappropriate.

10 Transcript at 9:1-12, Exh. 4 to Anderson Decl. After hearing argument, Judge Roberts made
11 the following oral ruling:

12 I am going to grant the motion for summary judgment, with the exception of
13 the Rule 11 sanctions. I would like further briefing on that topic. I am inclined
14 to grant CR 11 sanctions based on a lack of investigation into the claims, as
well as an improper motive in bringing the lawsuit, but I don’t do that very
often and I would like further briefing on that.

15 Transcript at 39:15-22, Exh. 4 to Anderson Decl. Judge Roberts also issued a written order,
16 but it did not shed much more light on the basis for her decision:

17 IT IS ORDERED, ADJUDGED, AND DECREED that the Personal
18 Representative’s Motion for Summary Judgment is GRANTED and
Petitioner’s claims are dismissed as a matter of law. It is further

19 ORDERED that Schedule B to the First Amendment of the Emma C.
20 Rhodehamel Trust Agreement Dated November 20, 2000, and the No Contest
21 provisions in Decedent’s Will and Trust are hereby enforced, and, pursuant to
these provisions, any distributions Petitioner may have been entitled to from
the Estate of Emma C. Rhodehamel have lapsed.

22 Exh. 3 to Anderson Decl.

23 While the matter was being reviewed by the Washington State Court of Appeals,
24 Joyce filed the lawsuit now pending before this Court. See Complaint (filed Jan. 17, 2007).
25 The Court stayed this case pursuant to Colorado River Water Conservation Dist. v. United
26 States, 424 U.S. 800 (1976). Order dated April 25, 2007 (docket no. 27). In the order

1 staying the case, the Court observed that “Plaintiff correctly notes, . . . and Robert apparently
2 agrees, that the Superior Court did not consider Joyce’s claims against Robert for breach of
3 fiduciary duty.” *Id.* at 4:11-12. The Court also indicated that “Joyce has standing and is
4 entitled to have this Court consider the merits of the dispute. While this Court has no
5 intention of revisiting the issues of Emma’s competency and testamentary capacity, and of
6 the lapse of Joyce’s interest in Emma’s estate and trusts, the Court will consider Joyce’s
7 right against the named Defendants.” *Id.* at 6:5-9.

8 On June 4, 2007, the Washington State Court of Appeals issued an opinion affirming
9 Judge Roberts’s grant of summary judgment in favor of Emma’s estate. *In re Estate of*
10 *Rhodehamel*, 2007 WL 1589457, 2007 Lexis 1410 (reproduced in Exh. 1 to Bertram Decl.,
11 Exh. 15 to Anderson Decl., Exh. 4 to Jenkel Decl. (docket no. 39), and Exh. E to Strabuk
12 Decl.). In an unpublished decision, Judges Grosse, Agid, and Dwyer held that “the evidence
13 was overwhelming that the testatrix had the requisite capacity to execute the estate planning
14 documents and there was no evidence to support the allegation of undue influence.” 2007
15 WL 1589457 at *1, 2007 Lexis 1410 at ¶1. Division I observed that “[w]e have before us a
16 record replete with evidence from Emma’s attorneys, her doctor, and her caregiver that
17 Emma was competent, understood the nature and extent of her property, and understood her
18 intended disposition.” 2007 WL 1589457 at *4, 2007 Lexis 1410 at ¶18. The Court of
19 Appeals further noted that any presumption of undue influence arising from the facts that
20 Emma resided with Robert and that Emma consulted solely with Robert’s attorneys was
21 rebutted by counsel’s declaration indicating that Emma independently sought advice and
22 made all of the decisions. 2007 WL 1589457 at *4, 2007 Lexis 1410 at ¶22. The judges
23 found persuasive counsel’s representation that “Robert’s *only* involvement was an attempt on
24 his part to persuade his mother not to disinherit Joyce.” *Id.* (emphasis added).

25 Finally, Division I concluded that the “no contest” provision of the Trust, as finally
26 amended, barred Joyce from recovering under the CLAT. 2007 WL 1589457 at *5, 2007

1 Lexis 1410 at ¶24. The Court of Appeals, however, touched on this issue only briefly in its
2 opinion, and it did not mention the fact that Robert, not Emma, signed the CLAT instrument,
3 it did not address whether the “no contest” clause applied to documents executed by an
4 attorney-in-fact, and it did not discuss the apparent inconsistency between Robert’s
5 involvement with the formation of the CLAT and counsel’s declaration that Robert’s role in
6 Emma’s estate planning was limited.

7 In August 2007, after being advised that the state court proceedings were concluded,
8 this Court lifted the stay and returned this case to the active docket. Order dated August 22,
9 2007 (docket no. 35). The Court set a deadline for the parties to file motions addressing
10 whether plaintiff’s claims are barred by the state court litigation, and stayed discovery and
11 the submission of a joint status report. *Id.* Each of the three groups of defendants filed a
12 dispositive motion seeking dismissal of all of plaintiff’s causes of action. Those motions are
13 now ripe for the Court’s consideration.

14 **Discussion**

15 **A. Motions to Strike**

16 Plaintiff has submitted transcripts of recorded telephone conversations between
17 plaintiff and her sister, as well as between plaintiff and her mother. The Rhodehamel
18 Defendants move to strike the transcripts of communications with Emma on the ground that
19 plaintiff did not obtain Emma’s consent to the recordings. *See* Reply at 3 (docket no. 56).
20 The Court DENIES the Rhodehamel Defendants’ motion to strike because the Washington
21 statute requiring consent of all parties to record a “[p]rivate communication transmitted by
22 telephone,” RCW 9.73.030, does not apply to recordings made outside the state. *State v.*
23 *Fowler*, 157 Wn.2d 387, 395, 139 P.3d 342, 347 (2006) (“the test for whether a recording of
24 a conversation or communication is lawful is determined under the laws of the place of the
25 recording”). The Rhodehamel Defendants have cited no authority to support the proposition
26 that the recordings at issue were made in violation of Indiana law. In contrast, the Law Firm

1 Defendants have conceded that, for recording of a private conversation, Indiana requires the
2 consent of only one party. *See* Reply at 11 n.5 (docket no. 57); *see also Wells v. Wells*, 489
3 N.E.2d 972 (Ind. Ct. App. 1986) (affirming the admission into evidence of a wife's recording
4 of a telephone conversation with her husband pursuant to 18 U.S.C. § 2511, which permits a
5 private person to intercept a wire or oral communication if that person is a party to the
6 communication).

7 The Law Firm Defendants, however, move to strike the transcripts of plaintiff's
8 conversations with her mother on grounds of hearsay and the deadman's statute. With regard
9 to the hearsay challenge, the Court DENIES the motion to strike for failure to identify with
10 particularity the statements to be excluded from the Court's consideration in connection with
11 the Law Firm Defendants' motion for summary judgment. The transcripts are over 100
12 pages in length, and not all of the contents thereof are being offered for "the truth of the
13 matter asserted." Fed. R. Evid. 801(c). With respect to the argument under the deadman's
14 statute, the Court also DENIES the motion to strike for lack of specificity. Washington's
15 deadman's statute provides in pertinent part:

16 in an action or proceeding where the adverse party sues or defends . . . as
17 deriving right or title by, through or from any deceased person . . . [that person]
18 shall not be admitted to testify in his or her own behalf as to any transaction
had by him or her with, or any statement made to him or her, or in his or her
presence, by any such deceased . . . person

19 RCW 5.60.030. In interpreting the statute, the Washington State Court of Appeals has
20 observed that "[n]ot all testimony by a party in interest about the words or acts of the
21 decedent is prohibited. The bar extends only to words or acts involving a transaction."
22 *Bentzen v. Demmons*, 68 Wn. App. 339, 344, 842 P.2d 1015, 1019 (1993).

23 Here, the transcribed conversations between plaintiff and her mother generally do not
24 deal with transactions between them. Some of the potentially relevant discussions concerned
25 whether Emma understood the LLC structure, or whether she knew Dean Sargent, who was
26 sending Joyce correspondence on Emma's behalf and who was the trustee for the First and

1 Second CRUTs and for the CLAT. Exh. 1-B to Affidavit, Exh. 1 to Anderson Decl. These
2 conversations might relate to matters for which the doctrines of res judicata or collateral
3 estoppel provide the basis for decision, but they do not appear inadmissible on deadman's
4 statute grounds. Moreover, to the extent that plaintiff's claims sound in breach of fiduciary
5 duty as against Robert or others, as opposed to a right asserted against Emma's estate, the
6 deadman's statute does not appear to apply at all. *In re Davis Estate*, 23 Wn. App. 384, 385,
7 597 P.2d 404, 406 (1979) (deadman's statute "excludes testimony when offered against the
8 decedent's estate").

9 **B. Procedural Standards**

10 **1. Summary Judgment**

11 The Court must grant summary judgment if no genuine issue of material fact exists
12 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The
13 moving party bears the initial burden of demonstrating the absence of a genuine issue of
14 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material if it
15 might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby,*
16 *Inc.*, 477 U.S. 242, 248 (1986). In support of its motion for summary judgment, the moving
17 party need not negate the opponent's claim, *Celotex*, 477 U.S. at 323; rather, the moving
18 party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict
19 in favor of the opponent, *Anderson*, 477 U.S. at 249.

20 When a properly supported motion for summary judgment has been presented, the
21 adverse party "may not rest upon the mere allegations or denials" of its pleadings. Fed. R.
22 Civ. P. 56(e). The non-moving party must set forth "specific facts" demonstrating the
23 existence of a genuine issue for trial. *Id.*; *Anderson*, 477 U.S. at 256. A party cannot create
24 a genuine issue of fact by simply contradicting his or her own previous sworn statement,
25 *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999), or by asserting "some
26 metaphysical doubt" as to the material facts, *Matsushita Elec. Indus. Co. v. Zenith Radio*

1 Corp., 475 U.S. 574, 586 (1986). Likewise, discrediting the testimony proffered by the
 2 moving party will not usually constitute a sufficient response to a motion for summary
 3 judgment. Anderson, 477 U.S. at 256-57.

4 To survive a motion for summary judgment, the adverse party must present
 5 “affirmative evidence,” which “is to be believed” and from which all “justifiable inferences”
 6 are to be favorably drawn. Id. at 255, 257. When the record, however, taken as a whole,
 7 “could not lead a rational trier of fact to find for the nonmoving party,” summary judgment is
 8 warranted. See Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 988 (9th Cir. 2006); see
 9 also Beard v. Banks, 126 S. Ct. 2572, 2578 (2006) (“Rule 56(c) ‘mandates the entry of
 10 summary judgment, after adequate time for discovery and upon motion, against a party who
 11 fails to make a showing sufficient to establish the existence of an element essential to that
 12 party’s case, and on which that party will bear the burden of proof at trial.’” (quoting
 13 Celotex, 477 U.S. at 322)).

14 **2. Failure to State a Claim**

15 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
 16 provide detailed factual allegations, it must offer “more than labels and conclusions” and
 17 contain more than a “formulaic recitation of the elements of a cause of action.” Bell Atlantic
 18 Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).² The complaint must indicate more than
 19 mere speculation of a right to relief; it must provide “plausible” grounds for recovery. Id.
 20 When a complaint fails to adequately state a claim, such deficiency should be “exposed at
 21 the point of minimum expenditure of time and money by the parties and the court.” Id. at
 22 1966. A complaint may be lacking for one of two reasons: (i) absence of a cognizable legal

23
 24 ² In Twombly, the Supreme Court expressly rejected the standard articulated in Conley v. Gibson, 355 U.S. 41,
 25 45-46 (1957) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond
 26 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”). See
 127 S. Ct. at 1969 (“Conley’s ‘no set of facts’ language has been questioned, criticized, and explained away
 long enough. . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its
 retirement.”).

theory, or (ii) insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the plaintiff's allegations and draw all reasonable inferences in the plaintiff's favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). If the Court considers matters outside the complaint, it must convert the motion into one for summary judgment. Fed. R. Civ. P. 12(b). If the Court dismisses the complaint or portions thereof, it must consider whether to grant leave to amend. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1193 (S.D. Cal. 2005) (citing *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000)).

C. **Res Judicata and Collateral Estoppel**

Each group of defendants asserts that the doctrines of res judicata and collateral estoppel bar some or all of plaintiff's claims. The Carroll Defendants go so far as to argue that plaintiff's claims for breach of fiduciary duty and the like are precluded even though neither the King County Superior Court nor the Washington State Court of Appeals addressed them because plaintiff "could have" presented them, but did not properly manage her case. Motion to Dismiss at 13-14 (docket no. 36). The Court does not adopt this latter view of the posture of plaintiff's claims.

A thorough discussion of Washington law on res judicata and collateral estoppel is contained in *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 941 P.2d 1108 (1997). In that case, Division II observed that res judicata "is not a precise term." *Id.* at 327, 941 P.2d at 1111. Res judicata generally refers only to preclusion of the same claim, while the term collateral estoppel "denotes the preclusive principles that apply when the subsequent suit involves a different claim but the same issue." *Id.* at 327, 941 P.2d at 1112 (quoting Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985)). The Washington Supreme Court, however, "has used res judicata to mean both claim preclusion and issue preclusion, saying, for example, that '[r]es judicata refers to

1 the preclusive effect of judgments, including the relitigation of claims and issues that were
2 litigated, or might have been litigated, in a prior action.’ ” *Id.* at 328, 941 P.2d at 1112
3 (emphasis added)(quoting *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 887 P.2d 898
4 (1995)). When res judicata is meant to describe just claim preclusion, it bars “not only . . .
5 points upon which the court was actually required by the parties to form an opinion and
6 pronounce a judgment, but to every point which properly belonged to the subject of
7 litigation, and which the parties, exercising reasonable diligence, might have brought
8 forward at that time.” *Id.* at 329, 941 P.2d at 1113 (emphasis in original). In other words,
9 “all parts of a successful claim are merged in the final judgment” and “all parts of an
10 unsuccessful claim are barred by the final judgment.” *Id.* at 330, 941 P.2d at 1113.

11 In determining whether a matter should have been litigated in a prior proceeding, no
12 one simple or all-inclusive test is used; rather, Washington courts consider a variety of
13 factors, including “whether the present and prior proceedings arise out of the same facts,
14 whether they involve substantially the same evidence, and whether rights or interests
15 established in the first proceeding would be destroyed or impaired by completing the second
16 proceeding.” *Id.* In addition, res judicata will not operate “if a necessary fact was not in
17 existence at the time of the prior proceeding, or if evidence needed to establish a necessary
18 fact would not have been admissible in the prior proceeding.” *Id.* at 331, 941 P.2d at 1114.
19 Similarly, res judicata will not operate in the face of valid reasons for not previously
20 asserting the claim, for example, when “the matter was an independent claim not required to
21 be joined, or if the matter’s omission from the prior proceeding actually benefitted, rather
22 than vexed, the party now purporting to rely on res judicata.” *Id.*

23 Here, while attempting to litigate her claims in Washington from her residence in
24 Indiana, plaintiff apparently grew dissatisfied with her Bellevue-based attorney and took
25 affirmative steps to obtain different representation. Her new counsel immediately sought a
26 continuance, making known his desire to amend the petition and present additional claims.

1 In denying the additional time requested, Judge Roberts provided no explanation. This
2 record of events in King County Superior Court does not evidence a lack of reasonable
3 diligence on plaintiff's part. Moreover, some of the evidence on which plaintiff seeks to rely
4 in this case, for example transcripts of conversations with her mother, probably would not
5 have been admissible in the state court proceedings. Finally, no showing has been made that
6 the breach of fiduciary duty and other claims now at issue were subject to mandatory joinder
7 in the state court action, and the parties currently claiming res judicata benefitted from the
8 previous omission of those claims.

9 Thus, plaintiff's claims for breach of fiduciary duty and the like are not barred on res
10 judicata or collateral estoppel grounds for failure to present the claims in the prior state court
11 action. The state court decisions have preclusive effect only with respect to the matters
12 actually litigated, namely that Emma had the requisite capacity to execute the documents she
13 signed, that the evidence presented by Joyce was insufficient to prove undue influence by
14 Robert upon Emma, and that the "no contest" provision of the First Amendment to the
15 Second Restatement of the Trust extended to the CLAT. None of these rulings, however,
16 fully vitiate plaintiff's causes of action in this case, which involve the activities of plaintiff's
17 brother and sister and of her mother's attorneys, as opposed to Emma's mental state, and the
18 merits of plaintiff's claims therefore must be addressed.

19 **D. Fiduciary Duties of Trustee**

20 **1. To Remainder Beneficiaries**

21 The Rhodehamel Defendants assert that a trustee of an inter vivos revocable trust
22 owes no fiduciary duty to the remainder beneficiaries, and that, plaintiff's claim against
23 Robert for breach of fiduciary duty therefore lacks merit. They, however, cite no
24 Washington case directly on point. They offer only cases from other states that are factually
25 distinguishable. For example, in both cases from Utah and the case from Texas cited by the
26 Rhodehamel Defendants, the trustee was also the settlor (or co-settlor) of the trust, who

1 retained the ability to partially or completely revoke the trust. *In re Estate of West*, 948 P.2d
2 351 (Utah 1997); *Perrenoud v. Harman*, 8 P.3d 293 (Utah Ct. App. 2000); *see Moon v.*
3 *Lesikar*, 230 S.W.3d 800 (Tex. Ct. App. 2007). Similarly, in the Nevada case to which the
4 Rhodehamel Defendants referred, the trustee was the settlor of a revocable trust, and was
5 still alive (although apparently incompetent) at the time the remainder beneficiaries
6 challenged amendments to the trust. *Linthicum v. Rudi*, 148 P.3d 746 (Nev. 2006). In all
7 four cases, the courts held that remainder beneficiaries either have no standing or have no
8 claim when the settlor of a revocable trust transfers or otherwise disposes of trust property;
9 such actions operate as a partial or complete revocation of the trust and divest the remainder
10 beneficiaries of their rights. *See Linthicum*, 148 P.3d at 749; *Moon*, 230 S.W.3d at 803-06;
11 *In re Estate of West*, 948 P.2d at 356 (“The children’s vested rights are subject to divestiture
12 and will not ripen until the death of the surviving settlor. . . . Consequently, we conclude
13 that Herschel West, Sr., as sole trustee [and sole surviving settlor], could sell or dispose of
14 the property as he saw fit.”); *Perrenoud*, 8 P.3d at 296-98.

15 In contrast, here, plaintiff’s breach of fiduciary claim concerns, at least in part, actions
16 taken by a co-trustee who was not a settlor of the trust. Robert executed the instrument
17 creating the CLAT as attorney-in-fact. As trustee, Robert transferred money and stocks from
18 the Trust to the CLAT. Emma’s signature does not appear on either the CLAT or the
19 authorization for Charles Schwab to transfer Trust property to the CLAT. The parties,
20 however, have not adequately addressed whether Joyce has standing to contest Robert’s
21 actions with respect to the CLAT. Thus, the remaining parties are DIRECTED to file
22 supplemental briefs addressing the following issues: (i) whether a trustee who is not a settlor
23 of a trust owes a fiduciary duty to the remainder beneficiaries; (ii) whether a trustee who is
24 not a settlor of a trust, but is a remainder beneficiary of the trust, owes a fiduciary duty to the
25 other remainder beneficiaries; (iii) if a fiduciary duty exists, what is the scope of that duty;
26 and (iv) whether and to what extent a trustee of an improperly created trust (here, potentially,

1 the CLAT) owes a fiduciary duty to the remainder beneficiaries of said trust. In preparing
2 their supplemental briefs, the parties should review Siegel v. Novak, 920 So.2d 89 (Fla. Dist.
3 Ct. App. 2006).

4 The Rhodehamel Defendants and the Law Firm Defendants may file separate or joint
5 opening supplemental briefs. If separate, the opening supplemental briefs shall not exceed
6 12 pages in length; if joint, the opening supplemental brief shall not exceed 24 pages in
7 length. The opening supplemental brief(s) shall be filed by February 21, 2008. Plaintiff's
8 responsive supplemental brief shall not exceed 24 pages in length and shall be filed by
9 March 10, 2008. Separate supplemental reply briefs, not exceeding 6 pages in length, or a
10 joint supplemental reply brief, not exceeding 12 pages in length, may be filed by March 14,
11 2008. The Rhodehamel Defendants' and the Law Firm Defendants' motions for summary
12 judgment are RENOTED IN PART to March 14, 2008.

13 **2. To Diversify Assets**

14 The Rhodehamel Defendants request a ruling that Robert, as trustee, had no duty to
15 diversify the Trust assets. They cite provisions of the Washington Trust Act of 1984 ("Trust
16 Act") as support. The statute codifies the "prudent investor" rule, which requires a trustee to
17 exercise the judgment and care that persons of prudence, discretion, and intelligence use in
18 the management of their own affairs. RCW 11.100.020(1); see also In re Estate of Cooper,
19 81 Wn. App. 79, 88-89, 913 P.2d 393, 398 (1996); Baker Boyer Nat'l Bank v. Garver, 43
20 Wn. App. 673, 678, 719 P.2d 583, 587 (1986) ("RCW 30.24.020 [now RCW 11.100.020]
21 codified the prudent person rule"). The statute contemplates that a fiduciary will diversify
22 investments unless contrary to the terms of the trust, inconsistent with the purposes of the
23 trust, or not required by other provisions of the Trust Act. RCW 11.100.047. The Trust Act
24 provides that "[e]xcept as to trust property acquired for consideration, a fiduciary may hold
25 and retain any such property without need for diversification as to kinds or amount and
26 whether or not the property is income producing." RCW 11.100.060.

1 The Rhodehamel Defendants contend that RCW 11.100.060 insulates Robert from
2 liability for not diversifying the portfolio of stocks in the Trust. They are correct. Here, the
3 Eli Lilly & Company stock was part of the original Trust res and was not acquired for
4 consideration. The Trust instrument contemplated that the stock would be held and then
5 distributed upon Emma's death to her children.³ Thus, Robert had no duty to diversify.

6 Plaintiff's response on this issue lacks merit. Plaintiff appears to argue that a broader
7 common law duty survives the enactment of the Trust Act.⁴ Plaintiff cites two cases for
8 support, but both cases concern trusts created before the effective date of RCW 11.100.060.
9 See In re Estate of Cooper, 81 Wn. App. at 83, 913 P.2d at 395 (testamentary trust
10 established in 1978); Garver, 43 Wn. App. at 675, 719 P.2d at 586 (testamentary trusts
11 created in 1964 and 1969); compare RCW 11.02.901 (Trust Act applies "to all instruments,
12 property relationships, and proceedings existing on January 1, 1985"). Moreover, both cases
13 involve testamentary trusts, not inter vivos revocable trusts, and therefore do not address the
14 effect of a settlor's decisions concerning the disposition of Trust assets, which decisions
15 cannot be challenged by remainder beneficiaries. The Court therefore GRANTS partial
16 summary judgment in favor of Robert Rhodehamel on plaintiff's claim for breach of
17 fiduciary duty to diversify investments and DISMISSES with prejudice Count II of the
18 Complaint.

19
20
21
22 ³ The Rhodehamel Defendants argue that, for tax reasons, Emma's and/or Robert's decision not to diversify the
23 stock portfolio resulted in a greater Trust res at the time of Emma's death. Motion for Summary Judgment at
24 17 n.72 (docket no. 40). Given the overall decrease in Eli Lilly & Company share prices over the life of the
trust, the Rhodehamel Defendants' analysis appears a bit simplistic, and the question whether a prudent
investor would have sold the stock and invested the Trust assets differently seems to be a factual dispute. In
light of the applicable legal standard, however, the Court does not reach this issue.

25 ⁴ Plaintiff made a different argument in the original response brief; plaintiff then moved to amend the response
26 to make the contention summarized above. See Motion to Correct (docket no. 54). The Court GRANTS
plaintiff's motion to correct, and it has considered only the substituted analysis.

1 **3. To Transfer or Distribute**

2 The exact nature of plaintiff's claim concerning fraudulent transfer remains unclear.
 3 She has asserted the claim against Robert and Carole, and their respective foundations, as
 4 well as Dean Sargent. To the extent plaintiff challenges transfers made pursuant to the LLC
 5 Agreement or the two CRUT instruments, all of which were signed by Emma, plaintiff has
 6 no standing to contest those transactions. *See, e.g., In re Estate of West*, 948 P.2d at 356 (the
 7 settlor of a trust can sell or dispose of assets as he or she sees fit). The Court therefore
 8 GRANTS partial summary judgment in favor of the Carroll Defendants as to the fraudulent
 9 transfer claim in toto, and in favor of the Rhodehamel Defendants and Dean Sargent with
 10 respect to transfers to the LLC and the two CRUTs. With respect to the transfer of property
 11 from the Trust to the CLAT, however, the Court DEFERS ruling until after it reviews the
 12 requested supplemental briefs.

13 **E. Fraud and Conspiracy**

14 In response to the pending motions, plaintiff has identified the elements of fraud⁵ and
 15 conspiracy,⁶ but has offered no evidence to support those claims. With regard to the claim of
 16 fraud, plaintiff has not identified any representations of material fact made by any defendant
 17 that were either false or uttered with the requisite intent. With regard to the claim of
 18 conspiracy, plaintiff has not proffered any evidence of the requisite agreement. The Court
 19 recognizes, however, that plaintiff has not yet had an opportunity to conduct discovery in
 20 this matter. Thus, with respect to the fraud and conspiracy claims, the Court treats the

21 ⁵ Every element of fraud must be established by "clear, cogent, and convincing evidence." *Stiley v. Block*, 130
 22 Wn.2d 486, 505, 925 P.2d 194, 204 (1996). Under Washington law, fraud is defined as a representation of an
 23 existing, material fact, which is knowingly false, and which is made with the intent for another, who is ignorant
 24 of the falsity, to act in reliance on the truth of the representation, thereby causing that person to suffer damages.
 25 Id.

26 ⁶ Under Washington law, to prove civil conspiracy, a plaintiff must establish by "clear, cogent, and convincing
 evidence" that two or more people entered into an agreement to accomplish an unlawful purpose or to
 accomplish a lawful purpose via unlawful means. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins.
 Group, Inc.*, 114 Wn. App. 151, 160, 52 P.3d 30, 35 (2002).

1 pending motions as seeking dismissal pursuant to Rule 12(b)(6), and the Court DISMISSES
2 Counts III and VII, but without prejudice to plaintiff filing a motion for leave to amend
3 within 60 days of the date of this Order.

4 **F. Disclaimer of Interest in LLC**

5 Plaintiff seeks an accounting of the LLC, asserting that the disclaimer of her interest
6 in the LLC, contained in her attorney's letter to Daniel Quick, did not meet statutory
7 requirements and is therefore not valid. See Response at 9 n.55 (docket no. 47). Although
8 plaintiff's argument that the disclaimer is not enforceable has technical merit, it does not
9 entitle plaintiff to the remedy she seeks. Under Washington law, a beneficiary may disclaim
10 an interest in whole or in part. RCW 11.86.021. Such interest may be one created by
11 intestate succession, pursuant to a will or trust, or created by any testamentary or inter vivos
12 instrument or by operation of law. RCW 11.86.011(2)(a), (b), (c), & (o). If an interest is
13 disclaimed, then the interest passes as if the beneficiary had died immediately before transfer
14 of the interest, which for an inter vivos transaction is the date of creation. RCW 11.86.041;
15 see RCW 11.86.011(7)(a). To be valid, a disclaimer must be in writing, be signed by the
16 disclaimant, identify the interest to be disclaimed, and recite the disclaimer and extent
17 thereof. RCW 11.86.031(1). A beneficiary may disclaim via an agent or attorney if the
18 agent or attorney is so authorized by written instrument. RCW 11.86.021(2). Here,
19 plaintiff's disclaimer is via letter, not signed by plaintiff and not associated with a written
20 instrument authorizing plaintiff's attorney to sign on her behalf. Thus, the disclaimer does
21 not meet statutory requirements. Moreover, the disclaimer is equivocal, purporting to
22 disclaim the interest in the LLC "as currently structured," but seeking information for the
23 purpose of "request[ing] changes consistent with Emma's desires for the LLC."

24 Plaintiff, however, fails to provide any analysis concerning the effect of invalidating
25 the disclaimer. The record reflects that Emma understood plaintiff to be refusing an interest
26

1 in the LLC. For plaintiff to claim otherwise is simply disingenuous. As a result of plaintiff's
2 declination, the membership of the LLC was amended from 10% for each of Emma's three
3 children to 25% each for Robert and Carole.⁷ *See* Exhs. 28 & 42 to Anderson Decl. The
4 increase in Robert's and Carole's shares of the LLC was accomplished via gift by Emma
5 pursuant to Section 3.7 of the LLC Agreement, which states in part that "[a] Member shall
6 have the authority in his or her sole discretion to transfer all or any portion of the Member's
7 interest in the Company to any other Member." Exh. 15 to Bertram Decl. Because the
8 transfer of assets from the Trust to the LLC was made at Emma's direction, and because the
9 redistribution of LLC shares was made via Emma's notarized signature, plaintiff has no
10 grounds to unwind her exclusion from the LLC; Emma could have made these same
11 arrangements even if plaintiff had not purported to disclaim her interest. In light of the
12 record concerning Emma's understanding of plaintiff's intent, plaintiff will not now be heard
13 to complain that she should have received some share of the LLC. Thus, the Court GRANTS
14 partial summary judgment against plaintiff with regard to her declaratory judgment and
15 accounting claim, and DISMISSES with prejudice Count V of the Complaint.

16 **Conclusion**

17 For the foregoing reasons, the Carroll Defendants are DISMISSED from this action,
18 Counts II and V are DISMISSED with prejudice, and Counts III and VII are DISMISSED
19 without prejudice. With regard to Counts I, IV, and VI, to the extent they involve the CLAT,
20 the Court DEFERS ruling on the Rhodehamel Defendants' and the Law Firm Defendants'
21 motions for summary judgment and DIRECTS the parties to file supplemental briefs.

22 ///

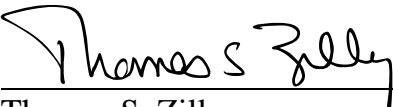
23 ///

24 ///

25
26 ⁷ The membership shares were subsequently revised to reflect 20% for Emma, 40% for Robert, and 40% for Carole. Schedule 1 dated Jan. 4, 2002, Exh. 20 to Bertram Decl.

1 IT IS SO ORDERED.

2 DATED this 29th day of January, 2008.

3 
4 Thomas S. Zilly
5 United States District Judge
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26